Supreme Court, U. S.
FILED
AUG 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-136

WHOLESALE MATERIALS COMPANY, INC.,
Petitioner,

versus

MAGNA CORPORATION d/b/a MISSISSIPPI STEEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION OF RESPONDENT

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JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257 (3) and under Rule 23 (1) (f) of this Court.

QUESTIONS PRESENTED

(1) Whether the Court has jurisdiction in this case to review the final judgment of the Supreme Court of Mississippi; (2) whether the Commerce Clause of the Constitution may be invoked to decide a matter of substantive state law.

STATUTES INVOLVED

28 U.S.C. §1257. State courts; appeal; certiorari Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:***

(3) By writ of certiorari*** where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Mississippi Code of 1972, § 75-2-201

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500.00) or more *is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought* or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is *received* and the party *receiving it has reason to know its contents,* it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received. (Italics supplied)

STATEMENT OF THE CASE

In offering testimony by its President, Mr. McLaughlin, petitioner failed to make proof that the letter and purchase order on which it relied to take its case out of the U.C.C. Statute of Frauds were placed in the United States mail. (R 174-175; 184-186). Respondent in its pleadings had denied the existence, mailing and receipt of the documents. It was on this basis that the trial court excluded the letter and purchase order when those documents were offered in evidence. Consequently the trial court held and was affirmed by the Supreme Court of Mississippi that no presumption of the receipt of the documents was raised by reason that the proper foundation for their admissibility in evidence had not been laid. In other words, this purely evidentiary matter as applied to U.C.C. § 2-201 was the sole

matter before the trial court on which it ruled and on which it excluded the proffered evidence. At the time that the trial court made such ruling no point was made by petitioner invoking the protection of the Constitution or the Commerce Clause thereof. Likewise, when petitioner presented to the trial court its motion for judgement n.o.v. it similarly failed to invoke the Commerce Clause or the protection of any Federal Statute.

Although petitioner had further opportunity to invoke the protection of the commerce Clause of the Constitution on its appeal to the Supreme Court of Mississippi, it also failed to raise any point thereasto in the state appellate court.

REASONS FOR DENYING THE WRIT

THIS COURT HAS ACQUIRED NO JURISDICTION TO CONSIDER THE PETITION FOR WRIT OF CERTIORARI

Under 28 U.S.C. § 1257 (3) and under Rule 23 (1) (f) where a review of the judgment of the State Supreme Court is sought on petition for writ of certiorari the burden is on the petitioner to show in its petition the stage in the proceedings in the trial court and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them; and the way they were passed upon by those courts as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. This requires that the petitioner raise the federal or constitutional question and bring it to the attention of the state court with fair precision and with a degree of particularity under the standard for framing the federal or constitutional question as ennunciated in *Oxley Stave Co. v Butler County*[1] as follows:

> "If a party intends to invoke for the protection of his rights the Constitution of the United States . . . he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court . . . The jurisdiction of this court to re-examine the final judgment of a state

[1] 166 U.S. 648, 655 (1897)

court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In the case at bar the state court's consideration was of an evidentiary matter as applied under U.C.C. § 2-201 and was a matter of substantive state law with no federal or consititutional question presented thereasto and under *Beck v. Washington*[2] this court does not acquire jurisdiction to consider the petition which raises a federal or constitutional question for the first time.

Moreover, although this court will review a decision of the state court when that decision rests on state procedural law, **Henry v. Mississippi**[3], no review is proper of a state court decision resting upon state substantive law. *Murdock vs. City of Memphis*[4] Therefore, since there was no federal or constitutional question raised in the state courts, petitioner was unable to and did not make any showing in its petition that those questions were timely and properly raised and thereby this court did not acquire and has no jurisdiction to consider the petition.

THE ISSUE RAISED BY PETITIONER IS A MATTER SOLELY INVOLVING SUBSTANTIVE STATE LAW

Under *Murdock v. City of Memphis,* supra, this court should not entertain on a writ of certiorari matters involving purely substantive state law. The petitioner takes the tenuous position that the evidentiary ruling of the Circuit Court of Forrest County, Mississippi will have an adverse impact on interstate commerce and that the importance of that ruling and decision as affirmed by the Supreme Court of Mississippi is exemplified by reason that it alters or conflicts with a rule in all states of the Union having to do with the presumption of receipt which arises upon deposit in the United States mail. The basic fallacy in this argument is that petitioner failed in its proof to show that the questioned documents were deposited in the United States mail.

[2] 369 U.S. 541, 549-550 (1952)
[3] 379 U.S. 443, 446-447 (1965)
[4] 87 U.S. (20 Wall), 590 (1875)

All of the case authorities cited in the petition[5] involved situations where there was no issue as to proof of mailing and unquestionably where there is proof of mailing a presumption of receipt arises in all States as well as in the State of Mississippi. The holdings of the trial court and the Supreme Court of Mississippi in the written opinions of those courts included in the appendix to the petition affirmatively indicate that proof of mailing was not made of the questioned documents and that that was the basis on which those courts determined that there had been no receipt of the documents by respondent so as to bring petitioner within the provisions of U.C.C. § 2-201 and thereby take the case of petitioner out of the Statute of Frauds.

Even aside, however, from the fact that petitioner simply failed in its proof on purely an evidentiary matter is the overriding consideration that the determination made by both the trial court and the state appellate court under U.C.C. 2-201, was that this ruling on the admissibility of evidence by the trial court was simply an interpretation of the evidentiary requirement attendant to the U.C.C. Statute of Frauds and such is hardly calculated to shut down interstate commerce. Although the Uniform Commercial Code is adopted by forty-nine states (not by the State of Louisiana) it is nevertheless a body of state law and not of federal law and each state though adopting it has adopted it with varying alterations and provisions. Moreover, the U.C.C. Statute of Frauds is nothing more than a recodification of traditional Statutes of Frauds which are in existence in all states as state substantive law. There is no aspect of interference with commerce under any application of this substantive state law by the trial court or the state apellate court. Clearly then, *A and P Tea Co. v. Cottrell*[6] cited in the petition does not apply where there was in question a regulation directly imposing restriction on milk distributions as between the two states.

[5] *Hagner v. U.S.* 285 U.S. 427, 430 (1931); *Atherton v. Atherton,* 181 U.S. 155, 171 (1900); *Rosenthal v. Walker,* Ill U.S. 185, 193 (1884); *Grannis v. Ordean,* 234 U.S. 385, 397 (1914); *Henderson v. Carbondale Coal and Coke Co.,* 140 U.S. 25, 27 (1891); *Schutz v. Jordan,* 141 U.S. 213, 220; *Kimberly v. Arms,* 129 U.S. 512 (1889)

[6] 424 U.S. 366 (1976)

If the case at bar is at all appropriate for a constitutional analysis in terms of the cited case, it should also be analyzed in conjunction with a reading of *DiSanto v. Pennsylvania*[7] mentioned in the cited case as holding that where regulation concerns interests peculiarly local, it does not infringe the national interest in maintaining the freedom of commerce across state lines. The significance or importance of the matters raised by the petition pales when it is recognized that the petitioner cites no cases indicating a conflict of decisions with the decision by the trial court and the state appellate court. In the case at bar, that decision will not and is not calculated to affect any litigants except petitioner and respondent, as the point upon which the petition is based is solely a ruling on evidence made by the trial court.

CONCLUSION

Respondent submits that the petition itself shows conclusively that no federal or constitutional question was raised by petitioner at any stage of the state court proceedings in this case and that alone precludes a consideration by this court of the petition on jurisdictional grounds. Further the petition seeks a review solely of a matter involving substantive state law which is of no significance whatsoever in affecting interstate commerce or of contravening any rights of petitioner under the Constitution.

Respondent therefore submits that the writ should be denied.

Respectfully submitted,

Bowman Sirling Tighe
Counsel for Respondent

[7] 273 U.S. 341 (1927)

CERTIFICATE OF SERVICE

I, Bowman Stirling Tighe, attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that I have this day forwarded to L. Arnold Pyle, Esquire, attorney for petitioner and have thereby served him with a copy of this response by United States First Class Mail, postage prepaid, in a duly addressed envelope to his regular mailing address at Watkins, Pyle, Ludlam, Winter and Stennis, Attorneys at Law, Post Office Box 427, Jackson, Mississippi 39205,

This the 21st day of August, 1978.

BOWMAN STIRLING TIGHE